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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122; PHIL L. VALLEY, JOHN ALEXANDER, AND JACK HEISDORF, EACH INDIVIDUALLY, AS BUSINESS AGENT, ORGANIZER, AND VICE-PRESIDENT, RESPECTIVELY, FOR, AND AS REPRESENTATIVES OF ALL THE MEMBERS OF HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 64, SOMETIMES KNOWN AS INTERNATIONAL BARTENDERS & BEVERAGE DISPENSERS, LOCAL No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All Affiliated With the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, INDIVIDUALLY AND AS CHAIRMAN OF, L. E. GOODING, INDIVIDUALLY AND AS A MEMBER OF, R. FLOYD GREEN, INDIVIDUALLY AND AS A MEMBER OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD;
PLANKINTON HOUSE COMPANY, A CORPORATION,
Respondents and Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY
And
I. E. GOLDBERG,
Attorneys for Petitioners.

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Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioners respectfully petition for a writ of certiorari to review a decision of the Supreme Court of Wisconsin, 236 Wis. 329, rendered November 8, 1940, motion for rehearing denied January 7, 1941, affirming a judgment of the Circuit Court of Appeals for Milwaukee County, Wisconsin, which sustained, confirmed, and enforced an order made by the Wisconsin Employment Relations Board on February 15, 1940. (The principal decision and the decision on rehearing are set forth as

Appendix "A" of petitioners' brief, attached to this petition at p. 38.)

Summary Statement of Matter Involved.

The individually named petitioners are members and officers of the Hotel & Restaurant Employees International Alliance, Local 122, a labor organization, affiliated with the American Federation of Labor, the membership of which is composed entirely of citizens residing and working in the City of Milwaukee, Wisconsin, and its environs.

The Wisconsin Employment Relations Board is an administrative body, created by Chapter 57, Laws of Wisconsin, 1939, (Wisconsin Statutes, Chapter 111), of which Henry C. Fuldner is the chairman, and L. E. Gooding and R. Floyd Green are commissioners or members.

Chapter 111 is known as the "Wisconsin Employment Peace Act". It was passed by the 1939 Legislature as a substitute for the State Labor Relations Act, patterned after the National Labor Relations Act and passed by the Legislature of 1937, which was repealed.

The so-called "Wisconsin Peace Act" sought to repudiate, and does pervert, the basic principles of the National Labor Relations Act and the 1937 Wisconsin Labor Relations Act patterned after it. The foundation on which the National Labor Relations Act rests is equalization of the bargaining power of employers and employees. The so-called "Wisconsin Employment Peace Act" removes the principle of equalization and again reinvests in employers powers far in excess of those possessed by employers before the passage of any labor relations act in this country.

The entire legislation, Section 111.06(2)(e) of which is in particular challenged herein, is set forth for the Court's convenience as Appendix "B" of petitioners' brief attached to this petition at p. 59.

The Plankinton House Company is a Wisconsin corporation, engaged in the general hotel business, and operating the Plankinton House and the Kilbourn Hotel in the City of Milwaukee, Wisconsin.

The Plankinton House Company employed approximately 160 employees eligible to membership in the petitioning unions, all of which employees were required to become and remain members of such unions pursuant to an all-union agreement entered into between the company and such unions. The unions and the Hotel Company entered into such written agreement on or about June 16, 1938, covering the terms and conditions of employment of the employees of the company, and recognizing the unions as the exclusive bargaining agents for such employees (R. 252).

On May 15, 1939, pursuant to a specific clause in such agreement, permitting the continuation thereof after revision, the unions gave notice to the company that they desired to continue the contract but to negotiate changes therein to become effective for the coming year. The company likewise served notice of proposed changes.

Upon the inability of the parties to agree upon such proposed changes the matter was submitted to an arbitration board, as provided for by the agreement. The arbitration award was unsatisfactory to the unions. The contract provided that if either party was dissatisfied with the award the right to strike or lockout was available. Therefore, pursuant to the contract, a strike was called of the employees, most of the employees of the hotels responding to the strike call (R. 253-256).

No secret vote was held amongst the employees prior to the strike, contrary to the provisions of the "Peace Act," Section 111.06(2)(e) thereof, providing:

> "(2) It shall be an unfair labor practice for an employee individually or in concert with others: • • • (e) To co-operate in engaging in, promoting or induc-

ing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.".

The unions engaged in picketing the entrances to the Plankinton House and the Kilbourn Hotel, and carried banners advising the public of the strike. During the early days of the strike there were some instances of disorder on the picket line consisting in all of 6 simple assaults and 2 instances of delivery stoppage, all occurring between November 4 and November 17, 1939 (R. 257-259).

The Plankinton Hotel Company complained to the Wisconsin Employment Relations Board, charging the petitioning unions, their officers, agents, and members, with having committed unfair labor practices by engaging in the concomitants of a strike although a majority of the employees had not first voted by secret ballot to call such strike, and praying that their picketing activities be restrained and enjoined (R. 58).

Petitioners answered and in their answer challenged the constitutionality of the legislation under which the Board purported to act (R. 70).

After a hearing and the taking of evidence, the Wisconsin Employment Relations Board, on February 15, 1940, made its findings of fact and conclusions of law and entered an order restraining the unions, their officers, agents, successors, and assigns, from

"(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House, or the Kilbourn Hotel;

* * * * * * *

"(c) Boycotting in any way the Plankinton House Company." (R. 251-262.)

The reasons for this order were stated by the Board, both in its Conclusions of Law and Decision, to be as follows: the respondent unions were "guilty of unfair labor practices by cooperating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employees of the Plankinton House Company by a secret ballot." (R. 259-260; R. 267-268.)

Pursuant to the method for appeal provided in the statute (Sec. 111.07(8)), the petitioning unions sought review and the setting aside of such order in the Circuit Court of Milwaukee County, Wisconsin, by petition which alleged in part that the order of the Board and the Act on which the order was based were unconstitutional and void as being repugnant to the Fourteenth Amendment to the United States Constitution (R. 2-6). The Board cross-petitioned for enforcement (R. 6). The Plankinton House Company, upon petition, was permitted to intervene as a party (R. 11). The Circuit Court affirmed, sustained and enforced the Board's order in its entirety by decision (R. 12-47), and by appropriate decree (R. 47-51), violation of which would be punishable by contempt.

The petitioning union then appealed to the Supreme Court of the State of Wisconsin, again raising on appeal the constitutional questions as aforesaid (R. 53). The Supreme Court affirmed the judgment of the Circuit Court for Milwaukee County on November 8, 1940, and upheld the Board's order prohibiting all picketing and boycotting in its entirety (R. 64).

Motion for rehearing was made and was denied by the Wisconsin Supreme Court on January 7, 1941, in a supplemental decision (R. 65 and 69).

In its principal decision the Court found that the "Peace Act" did not violate any constitutional prohibitions, specifically finding that the majority-minority classification

was a valid one.[1] It stated that the Act did not deprive anyone of the right to free speech, declaring, in addition, that in the case before it the occurrence of acts of violence had warranted the order in question. In its supplemental opinion on rehearing, the court seemed to rely heavily on the element of violence to sustain the order. (See R. 52 and 65. Or see Appendix "A" attached to brief, pp. 38 and 56.)

Statement as to Jurisdiction.

This case is one over which the Court has jurisdiction under the provisions of the Act of Congress of February 13, 1935, Section 237-b, 28 U. S. C. A., Section 344-b, giving jurisdiction to this Court:

> "to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by appeal any cause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution . . . "

This case is one in which the validity of the statutes of the State of Wisconsin, to wit, Sections 111.01 through 111.19, Wisconsin Statutes, 1939, particularly Section 111.06 (2)(e) thereof, and an order and enforcing judgment based

[1] Although the "Peace Act" contained other provisions which were vulnerable to constitutional attack, the Wisconsin Supreme Court passed only upon the validity of Section 111.06(2) (e) of the "Peace Act". Thus, for instance, Section 111.02(8) of the "Peace Act", defining a labor dispute, limits the permitted disputants to the "employer and the majority of his employees". Cf. *American Federation of Labor* v. *Swing*, decided February 10, 1941.

thereon, is drawn in question upon the ground that such statutes, order and judgment, on their face and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioners of liberty or property without due process of law, denying to the petitioners the equal protection of the laws, and more particularly, denying to the petitioners freedom of speech. The decision of the Wisconsin Supreme Court was in favor of the validity of the statute and order.

The said Supreme Court of the State of Wisconsin rendered its decision herein on November 8, 1940, and in a second opinion rendered on January 7, 1941, by the Honorable Marvin C. Rosenberry, Chief Justice of said Supreme Court, denied a rehearing.

On April 4, 1941, Mr. Justice Murphy, by appropriate order, extended the time for filing of this petition until June 3, 1941 (R. 72).

Said opinion of the Supreme Court of the State of Wisconsin, the last resort in all causes in the State of Wisconsin, is officially reported in 236 Wis. 329, 294 N. W. 632, 295 N. W. 634, and, as aforementioned, is attached at end of brief as Appendix "A."

The petitioning unions argued before the Wisconsin Employment Relations Board (R. 77-80), before the Circuit Court for Milwaukee County (R. 2-6), and before the Supreme Court of the State of Wisconsin (See decision, R. 53), that Section 111.06(2)(e) of the Wisconsin Statutes and the order of the Board were unconstitutional, void, and of no effect whatsoever because they were repugnant to the Fourteenth Amendment to the Constitution of the United States, as depriving petitioners (1) of freedom of speech and assembly, (2) of the equal protection of the

laws, and (3) of liberty and property, without due process of law.[2]

The Federal question of whether the Wisconsin Statutes in question and the order of the Board based on such statutes violated the Constitution of the United States thus was raised before every tribunal in which argument was heard.

The Supreme Court of Wisconsin specifically held that neither the statute nor the order deprived petitioners of any rights guaranteed under the Fourteenth Amendment to the Constitution of the United States, the court stating,

> "We discover no invasion of the right of free speech either in sub. (2)(e) 111.06 Stats. 1939, or in the way the law was administered by the Board in this case." (R. 64; App. "A", p. 55.)

While the principal decision of the Wisconsin Supreme Court, together with the decision on petition for rehearing, are in some respects somewhat difficult to fathom, the following is clear:

1. The Federal question of whether a requirement that the majority of employees in a bargaining unit must au-

[2] Under the Wisconsin Supreme Court practice errors are assigned in the brief. In the brief of petitioners herein, appellants before the Wisconsin Supreme Court, under the title "Errors Assigned" (pages 24-25), it is specifically set forth as follows:

"(1) The Circuit Court for Milwaukee County erred in affirming that order for the Wisconsin Employment Relations Board requiring the appellant Unions, their officers, members, agents, successors and assigns, to cease and desist from engaging in promoting or inducing picketing at or near the Plankinton House or Kilbourn Hotel and from boycotting in any way the Plankinton House for the reason that:

"(a) Section 111.06(2) (e), upon which such order is based, is unconstitutional, void and of no effect whatsoever, being contrary to the Fourteenth Amendment to the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin.

"(b) Such order deprives the Unions, their officers, members and agents from exercising the constitutional rights of freedom of speech, press and assemblage, guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin."

thorize a strike before peaceful picketing pursuant thereto can be permitted violates the Fourteenth Amendment, either because it deprives of the right to free speech or because it denies the equal protection of the laws, was passed upon in favor of its validity in the principal decision; (R. 59) Appendix "A", p. 50 and

2. In both decisions the Federal question of whether the order prohibiting all picketing and all boycotting, either as predicated upon the statute or as predicated on the facts and circumstances of the case, including the alleged violence, violated the Fourteenth Amendment was determined in favor of its validity (R. 64 and 69; Appendix "A", pp. 55, 56).

Some of the cases relied on in the courts below (except *Meadowmoor*, not then decided), and which the petitioners believe are in support of their position, and which will influence the decision of this Court, are as follows:

Thornhill v. *Alabama*, 310 U. S. 88;
Carlson v. *California*, 310 U. S. 106;
Senn v. *Tile Layers' Protective Union*, 301 U. S. 468;
American Federation of Labor v. *Swing*, 85 L. Ed. (Adv. Op.) 513;
Milk Wagon Drivers' Union v. *Meadowmoor Dairies, Inc.*, 85 L. Ed. (Adv. Op.) 497.

A copy of the entire record in this case, as certified to be true and correct by the Clerk of the Supreme Court of the State of Wisconsin, is hereby furnished, attached to, and made a part of this application in compliance with rule 38, paragraph 1, of the rules of this Court.

Questions Presented.

The following Federal questions, raised and argued before the Supreme Court of Wisconsin, are again brought forward here:

1. Is Wisconsin's so-called Peace Act, particularly Section 111.06(2)(e) prohibiting employees in a bargaining

unit from peaceful picketing or boycotting in connection with a strike, unless a majority in such unit have authorized the strike, void as contrary to the Fourteenth Amendment, depriving of the right to free speech and denying the equal protection of the laws?

2. Does the limited violence connected with the picketing in this case warrant curtailment of the right to discussion guaranteed by the Fourteenth Amendment through application by the Wisconsin Supreme Court of the principle or doctrine of the *Meadowmoor* case?

3. Even assuming the *Meadowmoor* doctrine applicable, did the Wisconsin Supreme Court err in not limiting the scope of the order to the proper confines of that doctrine so as to permit publicity practices involving no violence?

Reasons Relied on for Allowance of Writ.

1. The decision of the Supreme Court of Wisconsin is in conflict with the decisions of this Honorable Court in *Thornhill* v. *Alabama, supra; Carlson* v. *California, supra; American Federation of Labor* v. *Swing, supra;* and *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra.*

2. The question of the constitutionality of state legislation attempting to limit peaceful activities in connection with a strike, whether such activities consist of picketing or the boycott, to a situation in which the majority of employees in a particular unit have authorized such strike is, for the first time, presented to this Honorable Court for consideration. Such legislation, if left unchallenged, has inherent in it the danger of deprivation of constitutional rights to minority labor groups throughout the country under guise of a pseudo democratic procedure. Rights for which organized labor throughout the country has fought for years are threatened by this novel and dangerous type of legislation.

3. A perverted application of the doctrine of the *Meadowmoor* case has been relied upon by the court below to deny to workers constitutional rights. If uncorrected, it will permit the principle expressed in the *Meadowmoor* case to be extended to situations not contemplated under that decision and afford precedent for further disregard of constitutional restraints.

Prayer for Writ.

WHEREFORE, Your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the clerk of the Supreme Court of the State of Wisconsin, commanding that court to certify and send to this court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered 68 and entitled *Hotel & Restaurant Employees' International Alliance, Local No. 122, et al.*, v. *Wisconsin Employment Relations Board, et al.*, and that the judgment of the Supreme Court of the State of Wisconsin may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and meet; and your petitioners will ever pray.

JOSEPH A. PADWAY
and
I. E. GOLDBERG,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, ET AL.,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the Supreme Court of the State of Wisconsin is reported in 236 Wisconsin 329, and is appended hereto as Exhibit "A."

Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is Title 28 U. S. C. A., Section 344-b (Judicial Code, Section 237(b), as amended by the Act of February 13, 1925).

As seen in the jurisdictional statement in the foregoing petition, the constitutional objections to the legislation upon

which the present order forbidding all picketing, peaceful or otherwise, is based, and to the order itself, were raised and argued before every tribunal in which it was possible to raise and argue such questions, including the State Labor Relations Board, the Circuit Court of Milwaukee County, to which appeal from the Board's order must first be taken, and then in the Supreme Court of the State of Wisconsin, court of last resort for all causes in the State. The constitutional objections were discussed and passed upon by the Supreme Court of the State of Wisconsin, which court determined that such objections were not available to petitioners, and that the legislation and order did not invade any constitutional rights.

Statement of the Case.

A summary statement of the case appears in the Petition for Writ of Certiorari, which, in the interest of brevity, is incorporated herein by reference.

Specification of Errors.

The Supreme Court of the State of Wisconsin erred in the following respects:

In holding that Section 111.06(2)(e), Statutes 1939, was not violative of the Fourteenth Amendment to the Constitution of the United States.

In sustaining those portions of the order of the Circuit Court for Milwaukee County, Wisconsin, enforcing the order of the Wisconsin Employment Relations Board which provided that your petitioners

> "1. Immediately cease and desist from
>
> (a) Engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;
>
> * * * * * * *
>
> (c) Boycotting in any way the Plankinton House Company."

In sustaining the order so as to deny or prevent peaceful activities unattended by violence, disorder, or breach of the peace intended to make known the facts of the controversy between employees and employers.

ARGUMENT.

I.

Section 111.06(2)(e), Wisconsin Statutes, 1939, is Unconstitutional and Void and of no Effect Whatsoever Because It Contravenes the Guaranties of Free Speech and Equal Protection of the Laws Afforded by the Fourteenth Amendment to the Constitution of the United States.

The first question presented for consideration is whether Section 111.06(2)(e), prohibiting peaceful picketing in connection with a strike where such strike was not authorized by a majority of employees in a particular unit, contravenes the Fourteenth Amendment.

Some doubt may be raised as to whether this particular issue is involved by reason of the fact that the Wisconsin Supreme Court, in its supplementary opinion rendered on the petition for rehearing, indicated that it was not concerned with what a minority or a majority could or could not do and that the violence warranted the blanket prohibition against all picketing and all boycotting. However, that the constitutionality of Section 111.06(2)(e) is involved in this case is conclusively indicated by the following facts:

1. The State Labor Relations Board predicated its order prohibiting all picketing specifically and solely on the fact that petitioners had not complied with Section 111.06(2)(e) in securing the majority strike vote called for therein. See its Conclusions of Law 2 and 3 (R. 259) and its Memorandum Decision (R. 267). The element of

violence was not relied upon by such Board to support its order. Certain named individuals were found to have committed unfair labor practices by virtue of the misdemeanors committed by them (R. 260), but the only unfair labor practice found to have been engaged in by the respondent unions, petitioners herein, was the failure to secure the majority vote.

2. The decision of the Circuit Court for Milwaukee County, sustaining the order in its entirety, was again based upon the failure of petitioners to comply with Section 111.06(2)(e), and that court upheld Section 111.06(2)(e) as a valid exercise of the State police power. Here again, the element of violence was not relied upon to sustain the order. See Circuit Court decision (R. 12).

3. Most important is the fact that the principal opinion of the Supreme Court of Wisconsin deals at length with the validity of Section 111.06(2)(e), and that opinion specifically affirms the validity of that section as a valid exercise of the police power. This opinion has never been withdrawn. In addition, however, the element of violence is, for the first time, brought into the case as a partial basis for sustaining the Board's order.

The issue of the constitutionality of Section 111.06(2)(e) is thus seen necessarily to have been before the Wisconsin Supreme Court and was necessarily passed upon by that court. It was on that section of the statute, and on that alone, that the order against the unions was predicated. But for that order, the restraint against all picketing and all boycotting, finally upheld by the Supreme Court, would never have been issued in the first place. Any attempt by the Supreme Court in its supplementary opinion after motion for rehearing to circumvent passing upon the constitutionality of that section must be regarded as "so plainly unfounded that it may be regarded as essentially

arbitrary or a mere device to prevent review of the decision on the Federal question." See *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Ohio State Bank* v. *Bryan*, 282 U. S. 765, 774; *Johnson* v. *Risk*, 137 U. S. 300, 307.

In the present case, no question exists as to the legality of the purposes of the strike or the justification for the picketing. We have merely this simple and ordinary factual situation:

A group of unions have a contract with an employer. Upon the expiration of the contract, the unions seek improved terms. The employer refuses to accede to the proposed terms. The unions strike, and commence picketing and boycotting in support of such strike. The picketing and boycotting are enjoined under the "Peace Act" because such unions have refused to obtain a vote of employees to see whether a majority of them favor the strike, as required by Section 111.06(2)(e).

Does Section 111.06(2)(e) deprive the unions and their members of freedom of speech? And further, does Section 111.06(2)(e) deprive minority groups of the equal protection of the laws?

A.

SECTION 111.06(2)(e) IS NOT A PROPER EXERCISE OF THE STATE'S POLICE POWER AND UNLAWFULLY DEPRIVES PETITIONERS OF THE RIGHT TO FREEDOM OF SPEECH.

If the right peacefully to picket and boycott to inform the public of the facts of a labor dispute, and to marshall public opinion on the side of the worker, is, as many times determined by this Honorable Court, a concomitant of the right to free speech, surely this constitutional right is not one the exercise of which can be made dependent upon the wishes of a majority in a particular bargaining unit. Surely, it cannot be said that such a clear danger of sub-

stantive evils arises in cases of minority strikes or minority picketing or minority boycott as to justify an exercise of the state's police power in this respect.

1. "Picketing, Boycotting or Any Other Overt Concomitant of a Strike" When Peacefully Carried on Are Synonymous With the Terms "Free Speech" and "Liberty" as Those Terms Are Used in the Fourteenth Amendment to the Constitution of the United States.

The decisions of this Court in the cases of *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106, as well as its most recent pronouncements in the cases of *Milk Wagon Drivers Union, et al.*, vs. *Meadowmoor Dairies Inc.*, 854 L. Ed. (Adv. Op.) 497, and *American Federation of Labor* v. *Swing*, 85 L. Ed. (Adv. Op.) 513, have identified picketing and boycotting as the "working man's means of communication," and as synonymous with the term "free speech," which is within the protection of the Fourteenth Amendment to the Constitution of the United States from abridgment by the states.

In the *Thornhill* case this Court very significantly stated:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

In the *Carlson* case this Court stated:

> "For the reasons set forth in our opinion in Thornhill *v.* Alabama, supra, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or banner, must now be regarded as within that liberty of communication which is secured to every person by the

Fourteenth Amendment against abridgment by the State."

American Federation of Labor v. *Swing*, 85 L. Ed. (Adv. Op.) 513;
Senn v. *Tile Layers' Protective Union*, 301 U. S. 468;
C. I. O. v. *Hague*, 307 U. S. 196;
Schneider v. *State*, 308 U. S. 147;
Lovell v. *Griffin*, 303 U. S. 444.

2. Section 111.06(2)(e) Is to Be Tested on Its Face.

The Supreme Court of the State of Wisconsin did not test Sec. 111.06(2)(e) on its face, nor did it test the order entered thereon on its face, but wrote a tortured opinion seeking to justify the distinctions between majority and minority action on the basis of claimed distinctions between what was prohibition in the Alabama statute (*Thornhill* case) and what was only claimed regulation under the Wisconsin statute.

The Wisconsin Supreme Court stated in its opinion, with reference to the *Thornhill* case:

> "As construed by the state court it (the Alabama statute) prohibited the publishing of the facts of a labor dispute either by printed sign, by pamphlet, by word of mouth or otherwise. The Peace Act deals with concerted action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike." (R. 55, Appendix "A", p. 45.)

The court also sought to justify its refusal to follow the *Thornhill* case by stating that Section 111.06(2)(e) does not invade the right of freedom of speech because "the right of the individual to freedom of speech is by the terms of the act left unimpaired. It is the right to concert of action that is regulated." (R. 64, Appendix "A", p. 55).

The Wisconsin court further stated that Section 111.06

(2)(e) does not forbid picketing, but rather "attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees." (R. 55, and Appendix "A", p. 46.)

It is apparent from the few excerpts above quoted that the court did not seek to test this statute on its face at all, but sought to distinguish it from the statute before this court in the *Thornhill* case by drawing superficial and insubstantial distinctions.

This court in the *Thornhill* case stated that the statute had to be judged upon its face, pointing out that

> "proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. • • • It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. • • • *where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.* • • • " (Emphasis ours.)

The emphasized portion above is pertinent in the instant case in view of the undue emphasis placed by the Wisconsin court in its opinion on the motion for rehearing on isolated acts of violence which the Wisconsin Employment Relations Board found had occurred. Yet the board did not base its order on those few misdemeanors. Nor did the Wisconsin Supreme Court in its first opinion. The section should have been considered on its face inasmuch as the board had ample authorization under other sections of the statute to deal with cases involving violence or breach of peace. See Section 111.06(2) subsections (f) and (g) where

violence is specifically dealt with as a distinct and separate unfair practice. In spite of these sections where violence is separately treated, the court attempted to justify Sec. 111.06(2)(e) (majority-minority strike) on a "violence" theory.

3. Section 111.06(2)(e) Is Not Valid as a Proper Exercise of the Police Power of the State

Deprivation of the liberty of discussion in labor disputes can be permitted only when such deprivation is necessary to prevent a clear and present danger of the destruction of life and property or the invasion of the right of privacy. Freedom of speech can be abridged only when clearly necessary for the protection of some real and apparent danger to public safety, health or morals. As stated by the court in the *Thornhill* case, *supra*:

> "Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

Indeed, as stated by Justice Reed in his dissent in *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra:*

> "This nation relies upon public discussion as one of the indispensable means to attain correct solutions of problems of social welfare. Curtailment of free speech limits this open discussion. Our whole history teaches that adjustment of social relations through reason is possible while free speech is maintained. *This Court has the solemn duty of determining when acts of legislation or decrees of courts infringe that right guaranteed to all citizens. Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be of the kind that justify the suspension of the writ of*

habeas corpus or the suppression of the right of trial by jury." (Italics supplied.)

Clearly, no inherent danger to public property, health, safety or morals is present when peaceful picketing is carried on by a minority of employees rather than by a majority. No reason appears, nor has been offered, why peaceful picketing by minority groups is any more inherently dangerous to the public safety than peaceful picketing carried on by majority groups. The only possible reason which could be asserted in support of Section 111.06(2)(e) as a proper exercise of the police power is that picketing by minority rather than majority groups must necessarily and in all instances result in danger to public health, safety or morals. Such a contention has not been made and would, of course, be preposterous.

4. The Right To Disseminate Information Not Limited To Employer-Employee Relationship

The right of labor to disseminate information concerning controversies with employers must be placed upon the broadest basis, and is not limited to certain types of controversies as, for example, those specifically and directly involving only "wages, hours or working conditions", nor is it limited to controversies where immediate employees of the employer affected are disputing, or to where a particular class of employees are involved.

This question was definitely laid to rest by the decision of this Court in the case of *American Federation of Labor* v. *Swing, supra.* In that case an injunction of an Illinois court, restraining picketing and boycotting because there was no direct dispute between the working employees and their employer, was held to be an unconstitutional restraint of the right of free speech. The court stated:

"The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. American Foundries *v.* Tri-City Council, 257 U. S. 184, 209. The right of free communication cannot, therefore, be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. *Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case.* 'Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' Senn *v.* Tile Layers Union, 301 U. S. 468, 478." (Italics ours.)

Under this decision the State cannot make the right to picket dependent upon whether or not majority or minority groups of employees have approved in a secret written ballot. This decision quite obviously means that a State may not pick and choose between different types of "lawful" labor disputes, permitting the exercise of free speech and press as to some, and prohibiting the exercise of those rights as to others.

The constitutional right of Wisconsin workmen to *peacefully* disseminate information concerning an employer's labor practices by any of the methods falling within the "vague contours of the term 'picket'"

(*Thornhill* case) cannot be abridged by the state merely because the exercise of such right had not been previously licensed by a majority in a secret ballot vote of the employees of the particular employer involved.

The attempt under the present legislation to limit the area of economic conflict, or to limit the class of persons who may lawfully engage in economic conflict for the betterment of their conditions, would operate to prohibit efforts of Labor to improve its condition in many situations where it has heretofore found picketing and boycotting and other attempts to gain public support through publicizing the facts of a labor dispute not only helpful but vitally necessary. Thus, in the initial stage of organization Labor often finds picketing necessary either to perfect organization, or to achieve recognition, or to combat abuses or acts of discrimination by the employer. Abuses and discrimination are of much more frequent occurrence at the early stages of organization. If Labor is obliged to wait until an entire plant or a majority of an entire plant is organized before it can strike and picket, it will be unable to strike and picket or boycott, for the purpose not only of improving wages and hours and other working conditions, or of perfecting organization, or of securing recognition, but even of protecting itself against discharges or other unfair practices by the employer.

B.

SECTION 111.06(2)(e) OF THE WISCONSIN STATUTES AND THE ORDER BASED THEREON DENY TO THESE PETITIONERS THE EQUAL PROTECTION OF THE LAWS, SINCE THE STATUTE DOES NOT EMBODY REASONABLE CLASSIFICATION.

Under Section 111.06(2)(e) a minority group or a majority group, not having previously balloted, when engaging in conduct therein referred to, is subject to be summoned

before the Wisconsin Employment Relations Board to make answer there to the employer complaining about such conduct, whereas a majority group, having previously voted in a secret ballot in favor of a strike, engaging in the same conduct is not so subject to the operation of the law.

A most obvious defect in such classification is indefiniteness as to numbers. A minority group may be one employee in the case of a small establishment of three employees, or may consist of four or five thousand employees, as in the case of large industrial units. Likewise, a majority group might be as little as two and as many as eleven or twelve thousand. We are unable to find any reason in such classification. It is not a classification based upon environment, circumstances, nature of occupation, type of business, public interest involved, public health involved, public morals or safety; it has no relationship to the location of the plant or establishment, whether in an industrial or residential section, whether in a heavy traffic area or light traffic area, whether in an adequately policed area or not. It sets no definite arithmetical standard other than majority or minority. It says in one case two may do certain acts and in another case five thousand may not. It provides that in the same plant of 10,000 employees, with the same controversy over the same matters, five thousand and one may do an act, but four thousand nine hundred ninety-nine may not.

The question before discussed again presents itself—what is there inherent in the mere taking of a vote, or the failure to take a vote or the acquiescence by a majority to strike, which in the one instance presupposes that the picketing will not present a clear and present danger to the lives and property of citizens, and which, in the other instance, assumes that such clear and present danger will arise in every case of peaceful picketing?

It is clear that the Legislature has recognized that there is no inherent danger to the public in picketing carried on by a majority after an affirmative strike vote. The Wisconsin Supreme Court has not pointed out, nor has opposing counsel attempted to point out, any inherent difference between picketing carried on by a majority and picketing carried on by a minority who have failed to obtain a majority strike vote. Obviously, there is no such inherent difference which would permit the Legislature to presume that in the one case danger to the public would never result, and in the other case such danger *would always and in every instance result.*

The Supreme Court of Oregon, in *American Federation of Labor* v. *Bain*, 106 Pac. (2d) 544, was confronted with a statute passed by referendum vote of the people of Oregon, which likewise attempted to confine the right to picket to situations where the majority in an appropriate unit had voted to strike. The Supreme Court of Oregon found that such an attempted classification was unreasonable, had no proper relation to the purpose of the legislation, and denied to the minority group the equal protection of the laws. That court stated in this respect as follows:

> "The law's implied recognition of the right of the majority to picket when engaged in a controversy with their employer relating to wages, hours or working conditions, is also a recognition that picketing, peacefully conducted in those circumstances, does not give rise to 'the clear danger of substantive evils,' which alone may justify abridgment of the right. On what theory, then, can the abridgment of the right of the minority be supported? There is not inherently a difference in picketing, either with respect to the manner in which it is carried on, or the consequences to those who may be affected by it, based on the number of employees who may be disputing with their employer. On the contrary, whether engaged in on behalf of a few or many, picket-

ing may be peaceful or otherwise for a lawful or unlawful purpose, by a single individual or en masse, and fraught with either negligible or serious consequences to the employer and the public. See *People* v. *Gidaly*, 35 Cal. App. (2d) 758, 93 P. (2d) 660. Besides the invalid classification which the Court found in the cited case is a similar law, the fundamental defect of the statute, in the light of the Supreme Court's decisions is, that it is not aimed at specific evils which the state without doubt has power to correct; but the prohibition, to the extent that it applies, is as broad as that condemned in the Thornhill and Carlson cases, and like the enactments there considered, 'sweeps within the ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.'

"The fundamental constitutional right which the Supreme Court sustained in the cited cases was declared to be secured to 'every person'. We see no escape from the conclusion that the denial of such a right to the members of a minority is no less an unconstitutional abridgment of the right simply because it is saved to the majority."

It is interesting to note the Wisconsin Court's remarks with respect to the argument that majority rule is a fundamental tenet of our constitutional system. The argument is made that Section 111.06(2)(e) is merely an application of the majority rule, which is an essential part of our democracy. Attention is called to the majority rule provisions of the various labor relations acts and to the majority rule provision with respect to elections. However, the proponents of that argument overlook the very obvious fact that in those cases where the majority have made their selection the minority is, nevertheless, free to continue to exercise their constitutional rights without restraint. The Republican party today is still free to criticize all of the policies and practices of the majority-elected Democratic

President. Those who did not vote for our President, while bound by the results of the election, are, nevertheless, free to express their opinions concerning his conduct of our Government's affairs and so express themselves in the hope that they may establish a majority in the next election to defeat him.

The bulwark of our democratic form of government lies in *the constitutional guaranties that any person, regardless of whether such person is a member of a majority group or not, is entitled to the free expression of his own opinions and is liable only for the abuse thereof.*

There can be no question but that the attempted distinction in Section 111.06(2)(e) between majority and minority groups is an arbitrary one, is based on no ground of difference which has a fair relation to the object of the legislation, and unreasonably discriminates against the minority class. As such, the legislation and the order based upon such legislation are void as contrary to the Fourteenth Amendment. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

II.

The Decision of This Court in the Case of Milk Wagon Drivers of Chicago vs. Meadowmoor Dairies, Inc., Supra, Is Not Applicable.

A. The Basis for the Board Order as Seen by Board Decision, Circuit Court Decision and First Supreme Court Decision was Failure to Obtain Majority Vote and Not Violence.

The original decision of the Wisconsin Supreme Court in this case was very clearly and definitely based upon the holding of that court that distinguishing between what a majority may do in furtherance of an authorized strike and what a minority may do in furtherance of an unauthorized

strike constituted a valid exercise of the police power of the State of Wisconsin, and operated as a regulation of the right of free speech rather than a prohibition thereof.

On the motion for rehearing the court asserted that its opinion dealt only with the construction of Section 111.06(2)(e), and asserted that "the appellant employees, unions, and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful, and the right of free speech is in no way infringed by the statute or the order of the Board."

In our opinion the Wisconsin Supreme Court on the motion for rehearing sought deliberately to remove from this case any possible grounds for appeal to this Court. On the motion for rehearing it sought to place the decision upon a non-Federal ground entirely, and to assert that the decision was based upon the isolated acts of violence which occurred during the early days of the strike.

On March 21, 1941, the respondent unions, together with the president and secretary of the Wisconsin State Federation of Labor, and many other prominent Milwaukee and Wisconsin labor representatives were ordered to show cause before the Circuit Court for Milwaukee County, Wisconsin, why they should not be held in contempt of court for having violated the order which was affirmed by the Supreme Court of the State of Wisconsin (Case No. 170-382, Circuit Court, Milwaukee County, Wisconsin).

In that case it was the position and contention of the Attorney General for the State of Wisconsin, on behalf of the Wisconsin Employment Relations Board, that the order of the board prohibits entirely and completely all peaceful picketing, and all attempts, by word of mouth, letter, or otherwise, to induce or persuade others not to patronize the Plankinton Hotel and its employees.

Certainly the broad language of the order appealed from would justify such action. The order of the Board does prohibit all picketing and boycotting. It is argued in justification of the order that the Supreme Court of the State of Wisconsin merely anticipated the holding of this Court in the *Meadowmoor* case, and that on the basis of isolated acts of violence occurring in the early days of the strike the order prohibiting all picketing and boycotting was affirmed by the court.

There is absolutely no place in the findings of the board or in the order of the board, nor in its memorandum decision, any holding, indication, implication, or inference of any kind whatsoever that the board found that the activities of the union were "set in a background of violence," or that "it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful". (*Milk Wagon Drivers, etc., v. Meadowmoor Dairies, Inc., supra.*)

As a matter of fact, the memorandum decision accompanying the order of the Board clearly points out that the order prohibiting picketing and boycotting is based upon the fact that

> "Before going on strike, no vote by secret ballot authorizing the strike, was taken among the employees of the hotel. This, under Chapter 111 of the Wisconsin Statutes, is clearly an unfair labor practice, and all of the employees taking part in such strike are necessarily parties to such unfair labor practice. * * * To many this result may seem to be harsh penalty, *but it is a result that flows naturally from this law, and is something which this board as an administrative board has nothing to do with.*" (Italics ours.) (R. 851, 852.)

The decision of the Board in no way refers to the acts of violence nor characterizes the union campaign as being

one so marked by violence that peaceful picketing is impossible under the circumstances. Reference to the order of the Board indicates that the findings of fact with reference to the acts of violence are made only to sustain the conclusion of law that the persons named have committed unfair labor practices. This conclusion of law (R. 844) does not refer to or involve the union, nor are the activities of the individually named persons attributed to the union.

The Board specifically found in conclusion of law No. 2 (R. 844) that the respondent unions are guilty of unfair labor practices *only by virtue of the employees having gone out on strike without first obtaining the approval of the majority by secret ballot.*

The board ordered these petitioners to cease and desist from intimidation, force, or coercion, and properly so. This, however, was not tantamount to a finding of the Board that the peaceful activities engaged in by these organizations and their members are coercive, intimidating and injurious, and must, therefore, be prohibited in their entirety. That this is not so was recognized by the Circuit Court in its grant of a qualified stay of judgment, permitting peaceful activities during certain hours of the day and under certain circumstances (R. 52-57).

A careful examination of the findings of fact, conclusions of law, order, and memorandum (R. 846-854) fail to disclose any finding by the Board, express or implied, that the union had ratified or authorized the conduct of such employees, or that the unions by virtue of any such authorization or ratification have committed an unfair labor practice which results in denying to them the right to peacefully picket.

Certainly, it must be apparent that the few isolated acts of violence were not relied upon by the Board to justify the order prohibiting all picketing and all boycotting. As

a matter of fact, a part of the order of the board relates to the violence and provides as follows:

> "1. Immediately cease and desist from:
>
> * * * * * * *
>
> (b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company."

Therefore, it is obvious that the order prohibiting picketing and boycotting in no way and no sense was based upon any finding by the board that conduct engaged in by some of the pickets was of such nature that all picketing and boycotting could be restrained under the decision of this Court in the *Meadowmoor* case.

B. Assuming That Violence Was the Basis for the Order Prohibiting All Picketing and Boycotting, Such Order Cannot Be Supported by the Facts.

In the *Meadowmoor* case it was clear that the injunction of the court below was prompted by a situation of unusual and extraordinary violence from which it "could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful," and which acts of violence were "neither episodic nor isolated."

This Court also made it abundantly clear, however, that constitutional freedom was not to "be defeated by insubstantial findings of fact screening reality," and that, therefore, "this Court has the ultimate power to search the records in the State courts where a claim of constitutionality is effectively made." This Court pointed out that "the right of free speech cannot be denied by drawing from a trivial, rough incident or a moment of animal exuberance

the conclusion that otherwise peaceful picketing has the taint of force."

Accepting the findings of fact by the State board as a verity in the instant case we find that the strike occurred on November 2, 1939, and that hearing was had before the Wisconsin Employment Relations Board beginning with the 1st day of December, 1939. From November 4 through November 17, 1939, six pickets were arrested and fined in police court on charges of assault and battery, and on two occasions deliveries to the Plankinton Hotel were prevented by pickets by means of force (R. 257-259). The entire findings of the State Board in respect to violence appear on pages 257-259 of the Record as set forth in footnote 3 below:

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[3] 19. On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time Jack Heisdorf, vice-president of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, and on November 17, 1939, convicted of assault and battery, McLaughlin being fined $10.00 and costs and Heisdorf being fined $5.00 and costs, the sentence against Heisdorf being suspended and he was placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin and paid McLaughlin's fine.

20. Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House, was again arrested, convicted and fined $25.00 and costs and the union again provided him with counsel and paid such fine.

21. On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver displays and samples to the Plankinton House, were, by means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets.

22. On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force, prevented delivery of ice cubes to the Plankinton House, and in the course of the attempted delivery, Charles Alden assaulted Robert Jeske, then an employee of the Plankinton House.

23. On November 17, 1939, Paul Ziebell, an employe of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union,

Certainly, by no stretch of the imagination could such fugitive encounters, occurring only in the early days of the strike, when feelings usually run highest, be held to justify a complete restrain on all peaceful picketing and boycotting activities in the future. The Wisconsin Employment Relations Board did not so hold, but the Supreme Court of the State of Wisconsin, in the opinion rendered on the motion for rehearing apparently did so hold. We say "apparently" since the decision on the motion for rehearing merely further obscured an already obscure and evasive opinion.

In such case it still rests with this Court "to enforce constitutional liberties even when denied through spurious findings of fact in a State court."

As before mentioned, the following cases confer jurisdiction upon this Court to issue a writ of certiorari to a State court where any purported non-Federal ground to support the decision is "so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of the decision upon the Federal question":

Leathe v. *Thomas*, 207 U. S. 93, 99;
Ohio State Bank v. *Bryan*, 282 U. S. 765, 774;
Johnson v. *Risk*, 137 U. S. 300, 307.

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and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs.

24. On November 14, 1939, Edward Knopf, an employe of the Plankinton House, was assaulted by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House.

25. On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs.

26. On November 17, 1939, Thomas James, an employe of the Plankinton House, was assaulted by Larry McAllen, a picket stationed at the hotel by the union, and fined five dollars and costs.

III.

The Order Is More Comprehensive Than Necessary or Proper under the Doctrine of the Meadowmoor Case.

In the *Meadowmoor* case this Court repeatedly emphasized that the injunction therein justified itself because of the extreme case of violence therein presented to the court. The court was careful to point out that an injunction which is based upon extreme cases of violence must, nevertheless, be directed only to those activities which can reasonably be associated with violence. The court pointed out that there was no justification in the *Meadowmoor* case to anticipate that the injunction therein sustained would be put to "abnormal uses."

The court also stated that it was not proper in that case to

> "generalize the terms of an injunction derived from and directed toward violent conduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

In the instant case we do have an injunction which is a complete prohibition of all picketing and of all boycotting which would include in its broad meaning all other means of communication wholly unrelated to the violence involved. The prohibition against "boycotting in any way the Plankinton House Company" is as all-inclusive and general an interdiction as could be imagined.

We have pointed out that there is now pending in the Circuit Court for Milwaukee County a proceeding in which it is sought to hold the entire labor movement of the State of Wisconsin in contempt of court because of the writing of letters and making of public statements concerning the controversy at the Plankinton House.

We have in the instant case an order which is not at all limited in any reasonable or proper manner. The order

by its very terms prohibits every conceivable type of activity which labor organizations might engage in for legitimate purposes.

Your petitioners, in arguing before the Supreme Court of the State of Wisconsin, urged that the terms "picketing" and "boycotting" were so comprehensive that your petitioners were not completely apprised of what conduct could and could not be engaged in, and, further, that the terms necessarily include action which fell within the protection of the Constitutional guarantee of free speech. In its decision the Supreme Court answered this argument by stating:

> "While it is true that the terms 'picketing' and 'boycotting' are not terms of definite legal content, they are descriptive of a process well known to the law, and when considered in connection with the other provisions of Chapters 111 and 103, Stats. 1939, the meaning of these terms becomes reasonably certain."

Here was not an attempt to circumscribe the meanings of these terms to a limited situation relating to violence, but rather a recognition of the practically unlimited scope of such terms.

We, therefore, have in the instant case a prohibition which is as broad and as comprehensive a prohibition on the right of free speech as one might possibly conceive of. Certainly if it is the *Meadowmoor* case which it is claimed will support the injunction herein, the injunction is, nevertheless, much more comprehensive than the circumstances warrant. The writing of letters by the president of the Wisconsin State Federation of Labor urging prospective customers not to patronize the hotel certainly does not bear such close and intimate relationship to the acts of violence which have previously occurred which would justify the restraint upon such exercise of the right of free speech.

Yet not only does the order by its very terms prohibit such conduct, but the Attorney General of the State of Wisconsin in contempt proceedings so insists.

It is respectfully submitted that under no circumstances, for no reason, and under no theory known to law can an order as broad as the instant one be sustained.

Conclusion.

This case presents for decision the basic issue of whether or not Section 111.06(2)(e), Statutes 1939, ON ITS FACE is unconstitutional, void, and of no effect whatsoever because it is repugnant to the Fourteenth Amendment to the Constitution of the United States.

If the determination of the validity of this section of the statutes is not to be made upon its face then the further question is presented as to whether or not the statute, together with the order based thereon and judgment enforcing the same, deprive these petitioners of life, liberty, and property without due process of law, and deny to them the equal protection of the laws.

It is respectfully submitted by the petitioners that the statute when considered alone, as well as when considered with the orders and judgment based thereon and the testimony herein, must be held to be repugnant to the Fourteenth Amendment to the Constitution of the United States, and, therefore, null and void.

Wherefore, your petitioners submit that the relief prayed for should be granted, and that the decision of the Supreme Court of the State of Wisconsin be reversed.

Respectfully submitted,

JOSEPH A. PADWAY
and
I. E. GOLDBERG,
Counsel for Petitioners.

APPENDIX "A".

HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, and Others, Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, and others, *Respondents.*

September 13, 1940—January 7, 1941.

Appeal from a judgment of the Circuit Court for Milwaukee County: Gustave G. Gehrz, Circuit Judge. Affirmed.

This action was begun on February 24, 1940, by Hotel and Restaurant Employees' International Alliance, Local No. 122, Phil L. Valley, John Alexander, and Jack Heisdorf, each individually, as business agent, organizer, and vice-president, respectively, for and as representatives of all the members of Hotel and Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, all affiliated with the American Federation of Labor, petitioners, against Wisconsin Employment Relations Board, Henry C. Fuldner, individually and as chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, individually and as a member of the Wisconsin Employment Relations Board, and Plankinton House Company, a corporation, defendants, to review the findings, orders, and decisions made by the Wisconsin Employment Relations Board in the proceeding before that Board, entitled Plankinton House Company, a Wisconsin corporation, complainant, v. Hotel and Restaurant Employees' International Alliance, Local No. 122, and others, respondents, the findings having been made by the Wisconsin Employment Relations Board, hereinafter referred to as the "Board," on February 15, 1940. The matter was heard by the court, and on May 14, 1940, the court ordered and adjudged that the findings and conclusions of the Board

complained of be in all respects sustained, confirmed, and enforced. From this judgment the petitioners appeal.

Inasmuch as only questions of law are raised upon this appeal we shall state only so much of the facts as are material to an understanding of these questions. The petitioners are certain labor unions described above together with individuals, personally and as agents and officers of said unions. The defendants are the Wisconsin Employment Relations Board and the Plankinton House Company. On the 16th day of June, 1938, the Plankinton House Company entered into a collective-bargaining contract with the unions, which contract covered wages, hours, and working conditions governing employees of the Plankinton House Company employed at the Plankinton House and the Kilbourn Hotel, and provided as a condition of such employment that all employees coming within the terms of said contract must be and remain members of one of the respective unions so long as employed by the Plankinton House Company.

It was further provided that said contract was to continue for one year ending on the 15th day of June, 1939, and for consecutive one-year renewals unless either party served notice in writing on the other party at least thirty days before the expiration of such year that such party desired to terminate the contract at the end of the contract year. There was also a provision for notice of continuance and a provision for subsequent negotiations. The unions served notice of continuance on May 15, 1939, but desired to negotiate for improved hours, wages, and working conditions. The Plankinton House Company served notice that it desired to continue the contract for another year and desired to negotiate. Negotiations between the parties failed, arbitration was had in accordance with the terms of the contract, and on October 30, 1939, the Plankinton House Company gave notice of its willingness to execute a contract in accordance with the terms of the arbitration award. On November 2, 1939, in the afternoon, the employees of the company at both the Plankinton House and Kilbourn Hotel went on strike. Prior to calling such strike the employees did not vote by secret ballot to call such strike. Immediately after the strike was called, picketing was engaged in at the three entrances to the Plankinton House. Picketing

was carried on by the members of all the unions involved, and pickets carried banners bearing the names of all petitioning unions. The business manager of the Hotel and Restaurant Employees' International Alliance, Local No. 122, notified Marquette University and the Milwaukee School of Engineering that all students working at the Plankinton House for their meals immediately discontinue such work, and that unless such students did discontinue such work the union would be forced to stop the employment of such students working at other hotels and restaurants in the city of Milwaukee which had collective bargaining contracts with Local No. 122; that ever since the strike the Plankinton House and the Kilbourn Hotel have continued to operate with new employees replacing the striking employees.

On November 4, 1939, union pickets by means of force prevented the delivery of floral decorations to the Plankinton House; that as a result of the altercation, Jack Heisdorf, vice-president of Local No. 122, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, convicted, and paid fines. Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employee of the Plankinton House and was again arrested, convicted, and fined. Other fines were paid under similar circumstances by other striking employees and by pickets employed by the union. Convictions were had therefor.

Upon the basis of its findings of fact, the Board found as conclusions of law and made the following order:

"1. That the contractual relationship existing between the Plankinton House Company and the respondent unions was terminated by the respondent unions on the 2d day of November, 1939, by the refusal of said unions to accept the award of the board of arbitration, and their act of calling a strike at the Plankinton House and the Kilbourn Hotel.

"2. That the respondent unions are guilty of unfair labor practices by co-operating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the

majority of the employees of the Plankinton House Company by a secret ballot.

"3. That all of the former employees of the Plankinton House Company who went out on strike and who remained out on strike, have been parties to an unfair labor practice by co-operating and engaging in a strike without first obtaining the approval of a majority of such employees.

"4. That the following named persons, by reason of threats and assaults made by them to and on employees of the Plankinton House or persons seeking to do business with the Plankinton House, or by misdemeanors committed by them arising out of the controversy between the respondent unions and the complainant, Plankinton House Company, are guilty of unfair labor practices: Phil L. Valley, Jack Heisdorf, Charles McLaughlin, Charles Alden, James C. O'Brien, John Thomas O'Maher, Joseph Hofich and Thomas James.

"Upon the basis of the foregoing findings of fact and conclusions of law the Board, pursuant to Section 111.07 (4) of the Wisconsin Statutes, makes the following

"ORDER.

"It is ordered that the respondent unions, Hotel and Restaurant Employees' International Alliance, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, the officers, members, agents, successors and assigns of each, shall:

"1. Immediately cease and desist from:

"(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

"(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;

"(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the board finds will effectuate the policies of the act:

"(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;

"(b) Notify the board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith."

With its answer to the petition to set aside and vacate the order, the board filed a petition and cross complaint asking that the court enter an order confirming and enforcing all of the provisions of its order as amended. The petition and cross complaint having been brought on for hearing, the court by its judgment sustained the findings of the Board, and a judgment was entered accordingly sustaining, confirming, and enforcing the order.

ROSENBERRY, C. J. By ch. 57, Laws of 1939, the legislature repealed ch. 111 of the statutes of 1937 and created a new chapter to be designated ch. 111. We shall state only so much of this chapter as is necessary to present the questions to be considered. The chapter provides that it may be cited as the Employment Peace Act.

Sec. 111.01, Stats. 1939, declares the public policy of the state as to unemployment relations and collective bargaining. It recognizes that there are three major interests involved, namely, that of the public, the employee, and the employer.

Sec. 111.02, Stats. 1939, defines certain terms used in the chapter:

"(5) 'Collective bargaining' is the negotiating by an employer and a majority of his employees in the collective-bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such

employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

"(6) The term 'collective-bargaining unit' shall mean all of the employees of one employer (employed within the state), except that where a majority of such employees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective-bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do. * * *

"(8) The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective-bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

Sec. 111.06, Stats. 1939, defines what are unfair labor practices:

"(1) [Not involved here.]

"(2) It shall be an unfair labor practice for an employee individually or in concert with others: * * *

"(e) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective-bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike. * * *

"(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

While the briefs on both sides contain much matter relating to the history, background, and philosophy of labor legislation, the *sole* contention made here is that sub. (2) (e), sec. 111.06, Stats. 1939, is unconstitutional and void, (1) because it contravenes the guaranties of free speech afforded by the Fourteenth amendment to the constitution of the United States and section 3 of article I of the constitution of the state of Wisconsin; (2) because it does not constitute a valid exercise of the police power of the state since it is for the vindication of a private right and not a public right; (3) because it is indefinite and uncertain because it establishes no means or standards wherein and whereby the requisite balloting can be conducted and the results thereof ascertained, and is therefore incapable of application; and (4) because the terms "picketing" and "boycotting" are vague and indefinite; their use in the statute and order is not sufficient to apprize the unions as to what conduct is or is not prohibited.

In order to determine whether the Employment Peace Act is unconstitutional, it must first be construed. Petitioners argue that under the provisions of sub. (2) (e), of the act, sec. 111.06, Stats. 1939, and the order issued by the board pursuant thereto that individual employees are forbidden as individuals to do any of the things enumerated in the subsection except in support of an authorized strike. The legislature has very carefully and explicitly set out as an aid in the construction of the act what it intended to do in its declaration of policy. In addition to that, sec. 111.15, Stats. 1939, provides:

"Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employee of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes [unemployment benefits]."

The legislature also amended ch. 103, Stats., entitled "Employment Regulations," but did not amend or repeal sec. 103.53, Stats., which makes lawful the doing of certain things in labor disputes. It also redefined the term "labor dispute" as found in ch. 103, as follows:

"103.62 (3) The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective-bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

The act also established rules for determining when a case shall be held to involve or grow out of a labor dispute. The definition of "labor dispute," and the rules for determining when a case shall be held to involve or grow out of a labor dispute contained in ch. 57, Laws of 1939, are widely different in theory and purpose from like provisions to be found in the statutes of 1937, which they supplanted. Ch. 57 limits a labor dispute to a case where there is a controversy between an employer and a majority of his employees in a collective-bargaining unit. The definition contained in sec. 103.62 (3), Stats. 1937, was very much broader and much more inclusive than that contained in sec. 103.62 (3), Stats. 1939.

Upon the oral argument great stress was laid upon the fact that according to the terms of the act an employee was deprived of his constitutional right of freedom of speech. Appellants support their contention in this regard by reference to the case of *Thornhill v. Alabama* (1940), 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093. Counsel, however, ignore the fact that the *Thornhill Case* dealt with a statute which prohibited loitering or picketing and declared picketing to be a misdemeanor. As construed by the state court it prohibited the publicizing of the facts of a labor dispute whether by printed sign, by pamphlet, by word of mouth, or otherwise. The peace act deals with

concert of action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike.

The peace act, however, does not forbid picketing. It attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees. The peace act expressly provides that it shall not be so construed as to impair the right of free speech. One violating the provisions of the peace act is not guilty of a misdemeanor. His act is merely declared to be an unfair labor practice. The right to speak freely is guaranteed by the constitution, but that right, the same as other rights guaranteed by the constitution, is subject to limitations. In the exercise of that right one is not free from liability for libel, duress, or fraud, although speech was the agency in each case. *John F. Jelke Co. v. Beck* (1932), 208 Wis. 650, 242 N. W. 576; *Wisconsin Labor R. Board v. Fred Rueping L. Co.* (1938) 228 Wis. 473, 279 N. W. 673. See also *Schenck v. United States* (1919), 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Gitlow v. New York* (1925), 268 U. S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138.

The act does not limit the right of an employee to speak freely. It declares co-operating in "engaging in, promoting or inducing picketing, boycotting," etc., in aid of an unauthorized strike, to be an unfair labor practice. The fact that an employee in the course of doing the designated acts may use speech as a means of carrying on his activities, does not bring the acts within the protection of the constitutional guaranties of free speech. The term "picketing," as used in sub. (2) (e), sec. 111.06, Stats. 1939, does not include acts held in the *Thornhill Case, supra*, to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill Case* says the state has power to deal with "as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents."

Par. (e) by its terms does not apply to an individual. An individual cannot co-operate with himself. Par. (e) does not forbid an employee to quit his employment indi-

vidually or in concert with others. It does not forbid an employee singly or in concert with others from bringing about a vote by a collective-bargaining unit as to whether there shall be a strike. By the act strikes are divided into two classes,—authorized and unauthorized. Par. (e) has no application except in the case of an unauthorized strike. It is the act of co-operating in engaging in, promoting or inducing picketing, boycotting, or other overt acts in support of an unauthorized strike that par. (e) declares to be an unfair labor practice. Nowhere in the act is it declared that engaging in, promoting, or inducing picketing, boycotting, or any other act concomitant of a strike shall be deemed to be an unlawful act. It is declared merely to be an unfair labor practice. Our attention has been called to a decision of the supreme court of the state of Oregon, *American Federation of Labor v. Bain* (Or.), 106 Pac. (2d) 544, decided October 22, 1940. The statute under consideration in that case was widely different from ch. 111, Stats. 1939. In construing this statute the supreme court of Oregon said (106 Pac. (2d) 544, 554):

"In the statute there is no definition of the word 'picket.' It is a word of 'vague contours,' as the supreme court said in the *Thornhill Case*, and doubtless may be used to indicate conduct of a noxious character with which the state has power to deal. But it also embraces activities which the supreme court holds the state may not lawfully suppress. It includes, we think, the conduct of one who walks or patrols in the vicinity of a place of business involved in a labor dispute, and by word of mouth, banner or placard, undertakes to give information to the public concerning such dispute. The conduct of such person may be peaceful or otherwise; his demeanor orderly or threatening; the information true or false. The activity may be, and usually is, incident to an organized effort to prevail in the controversy, and we concur in the view of counsel for the defendants that it was precisely picketing by a member of a labor union and on behalf of his organization that the voters had in mind when they enacted this law. But that the activities embraced by the word 'picket' were intended to include such as are free from violence, intimi-

dation and fraud,—what is ordinarily called 'peaceable picketing'—we think there can be no doubt. It follows that the very type of conduct which the supreme court held in the *Thornhill* and *Carlson Cases* to be protected by the Fourteenth amendment, is denounced by the Oregon statute unless engaged in incident to a controversy relative to wages, hours or working conditions, between an employer and a majority of his employees."

As already pointed out, the Wisconsin statute expressly provides that it shall be so construed and applied that it shall not interfere with the right of free speech. As we understand and construe the statute, the right of free speech is not interfered with. The conduct complained of in this case, and described as "picketing," was not the sort of conduct that was indulged in by the defendant in the *Thornhill Case, supra.* The conduct complained of in this case and dealt with by the board and by the court was of an entirely different character. It was mass picketing, organized and carried on by the unions supplemented by boycott and violence, and was clearly within the exception stated in the *Thornhill Case* warranting state action. In that case the supreme court of the United States said (p. 105):

"We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger."

Ch. 111, Stats. 1939, is a statute of that character. We do not understand the decisions of the United States supreme court to mean that there can be no regulation of the right of picketing. That court has not yet said that a person who goes upon the premises of another for the purpose of creating a disturbance and disorganizing the other's business, is protected in the doing of such acts by the constitutional guaranty of free speech. In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of

these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution. In this respect it differs fundamentally from the statute that the Oregon supreme court had under consideration.

The effect of pursuing a course of conduct which under the statute amounts to an unfair labor practice is:

(1) To subject the actor to the provisions of sec. 111.07, Stats. 1939. Under it he may upon complaint be brought before the board where he may answer the complaint and appear in person or otherwise at the hearing, of which a full and complete record is required to be kept. After the final hearing the board is required promptly to make and file its findings. The board may by its final order dismiss the charges or require the person complained of to cease and desist from the unfair labor practice found to have been committed, suspend his rights of immunities, privileges, or remedies granted or afforded by the chapter for not more than a year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. The determination of the board may be enforced by the judgment of the circuit court.

(2) When a person is found guilty of an unfair labor practice he loses the benefit of sec. 103.53, Stats. 1939, which prescribes what acts, whether performed singly or in concert, shall be legal in the conduct of a labor dispute. He is thereby remitted to his rights under the constitution, other statutes, and the common law. This is recognized in sec. 111.07 (1), which provides, in part:

"Nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

This exception, of course, applies to the employee, employer, or any person connected with a particular controversy as described in sec. 111.06 (3), Stats. 1939.

(3) An employee who is guilty of an unfair labor practice may lose his status as an "employee" as defined in sec. 111.02 (3), Stats. 1939.

No rights of a person guilty of an unfair labor practice are invaded until there has been a final determination by the board. The statute is not self-executing. It merely provides the machinery by which certain described labor practices may, after due hearing, be held to be unfair, and the person complained of ordered to cease and desist therefrom. Nothing in the act prevents or was intended to prevent employees from making such demands upon their employer as they think the circumstances warrant. Whether such employees act singly or in concert they are within their rights in making such demands upon their employer. We find nothing in the act which prevents a minority of a collective-bargaining unit from withdrawing from employment either singly or in concert. They are not guilty of an unfair labor practice in so doing. But if they attempt to coerce their employer by concerted picketing, a boycott, or by any other similar overt act concomitant of a strike, they will be guilty of an unfair labor practice as defined in the act. We say similar overt act because the maximum of *ejusdem generis* applies. *Chicago & N. W. R. Co. v. Railroad Comm.* (1916) 162 Wis. 91, 155 N. W. 941.

The petitioners complain that the characterization of the acts of employees as unfair labor practices cannot be made to depend on the action of a majority of a collective-bargaining unit; that the legislature cannot place it within the power of a majority of the collective-bargaining unit to authorize a strike. This argument is an attack upon a principle which is fundamental in the attempt of the legislature and of congress to regulate labor relations. The principle upon which authorized collective bargaining depends is that the rule of the majority within an appropriate collective-bargaining unit shall bind the minority. We see no way by which the principle of collective bargaining can be maintained unless this right of a majority of a collective-

bargaining unit to speak for the unit including the minority is maintained. A bargain on behalf of a collective-bargaining unit amounts to nothing, if after it is made the individuals or some of them comprising that unit are not affected thereby. This principle is explicit in the National Labor Relations Act, in the Railway Labor Peace Act, and in the act now under consideration. If the majority of a collective-bargaining unit can thus coerce the minority in the matter of bargaining, we see no reason why the legislature may not vest in a majority of the unit power to determine whether such conditions obtain in the employment as warrant the calling of a strike in an effort to remedy them. There is no more delegation of legislative power in the one case than there is in the other. It is in most cases the same majority that made the bargain for the unit that determines whether a strike shall be called. We see in this no delegation of legislative power. Whether the conditions are such in the employment as justify the employees in striking is a matter more particularly within the knowledge of the employees than anyone else, and is in the last analysis merely a question of fact. A vote of the majority of the employees in a collective-bargaining unit to strike is a determination that facts exist which justify it. When such a determination is made, sub. (2) (e), sec. 111.06, Stats. 1939, does not apply. The method of determining when a strike is justifiable is almost identical with the method provided for the submission to a municipality of whether a particular law shall be effective within that municipality. The electors determine upon the basis of their own knowledge whether conditions are such as to make the operation of the law within the municipality desirable and conducive to the general welfare. That also is a question of fact. When a majority have voted to call a strike, the means and methods of coercion which they may employ are not unlimited or unrestricted. Less than a majority may strike, but they will be under the restrictions of the statutes as to the methods of coercion which they may use. Sec. 103.53 specifies with particularity what may be considered legal in the conduct of a labor dispute. These enumerated means striking employees not guilty of an unfair labor practice

are at liberty to employ. Any court or judge is forbidden to restrain the doing of such acts when done in connection with a labor dispute. The sole difference between coercive acts in support of a strike which has been called by a majority of members of a collective-bargaining unit and one which has not been so called is that the members of a minority group do not have the benefit of sec. 103.53, that is, by indulging in an unauthorized strike they lose their privileges under that section and are subject to the provisions of ch. 111, Stats. 1939, relating to unfair labor practices. The character of their coercive acts must then be determined either by submitting the controversy to the board or by "the pursuit of legal or equitable remedies in courts of competent jurisdiction." If one merely withdraws from his employment he is not subject to the act.

On behalf of the appellants fear is expressed that a—

"servile, docile or moribund majority refuses to place its stamp of approval, to grant a license, to the carrying on of peaceful, truthful appeals to the public."

This argument seems to disregard the fact that the question of whether intolerable working conditions, oppressive wages, or killing hours need correction is submitted to a majority of the group which must be suffering under these same conditions, the majority cannot by their action impose anything upon a minority that they do not by the same action impose upon themselves.

There is nothing in the history of the labor movement to warrant any fear that labor will be servile, docile, or moribund. On the contrary, no group within the body politic has shown itself more willing to stand upon its rights and sacrifice present advantage for future benefits than has labor.

The petitioners further contend that the cease-and-desist order is too broad; that even though the petitioners have been found guilty of unlawful labor practices in the conduct of their unauthorized strike, that all picketing and boycotting cannot be forbidden by the board, and cite as authority for their contention, *May's Furs & Ready-To-Wear, Inc., v. Bauer* (1940), 282 N. Y. 331, 26 N. E. (2d) 279.

The proceeding in the *May's* v. *Bauer Case* was one for injunctive relief. This contention is based on the assumption that the rules which apply to a court in granting injunctive relief apply in the hearing before the board. In the *May's Case*, the employer sought an injunction in a court of equity. The court said (p. 337):

"Upon this appeal there is involved the scope and application of a legislative enactment whose wisdom or lack of wisdom is not a consideration open to judicial inquiry. Subject only to constitutional restrictions, it is the duty of this court to apply the statute as enacted by the legislature."

The question decided was that the statutes of the state of New York, providing that the court should not issue injunctions in a case growing out of a labor dispute except in accordance with the provisions of the statute, were controlling; that under the statute the court could not enjoin lawful acts committed in support of a strike. We have a similar statute in Wisconsin (sec. 103.56), but by sec. 111.17, Stats. 1939, it is provided that the provisions of ch. 111, Stats. 1939, shall prevail wherever they conflict with the provisions of other statutes. This court is under the same duty to declare the law in accordance with the provisions of ch. 111 that the court of the state of New York was under to declare the law in respect to injunctions in labor disputes and for the same reasons.

It is argued that the terms "picketing" and "boycotting" are so vague, indefinite, and uncertain as to render sub. (2) (e), sec. 111.06, Stats. 1939, void. In support of that argument cases relating to the construction of statutes defining criminal offenses are cited. Ch. 111, Stats. 1939, creates no criminal offenses. Violation of any of its terms does not subject the actor to criminal prosecution. The board is charged with the duty of enforcing the act. The power of the board relating to enforcement does not arise until some party in interest has filed a complaint in writing.

There can be no question but that the purpose of the legislature in enacting ch. 111, Stats. 1939, was widely different from the purpose which actuated it in the enactment of

ch. 111, Stats. 1937, which was repealed. It appears from the briefs that much complaint was made because ch. 111, Stats. 1937, made no provision with respect to unfair labor practices by employers. In providing for "industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services" (sec. 111.01 (2), Stats. 1939), we see no reason why the legislature may not forbid concerted picketing and boycotting in aid of an unauthorized strike. Under sec. 103.51 *et seq.*, Stats. 1937, it was held that the plant of an employer might be picketed although there was no dispute between him and his employees and the employer employed no members of the union. *American Furn. Co. v. I. B. of T. C. & H. of A.* (1936) 222 Wis. 338, 268 N. W. 250. Under the same statute it was held that a labor union might conduct picketing operations for the purpose of coercing an employer to desist from performing work in his own business and in connection with projects undertaken by him. *Senn v. Tile Layers Protective Union* (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 872. It is apparent that the legislature was of the view that too wide a latitude was given to employees in their attempts to coerce their employers. All these questions relating to rights of employees to organize, conduct strikes, boycotts, and other coercive measures are in the field of public policy. As the court of appeals of New York said in the case already cited, and as this court has said many, many times, these questions are for the legislature. Courts do not sit to pass upon the wisdom or unwisdom of the acts of the legislature. In order to preserve order and prevent breaches of the peace, and assure to all citizens their lawful rights, the legislature may well forbid the doing of acts which under other circumstances would be lawful. The acts committed by the petitioners, as shown by the findings in this case, would have justified injunctive relief under the common law or any labor-relations statute, either state or federal.

While in the absence of legislation it was necessary for the court to declare public policy in controversies relating to labor relations, when the legislature acts within the constitutional limits of its power, its mandates supersede court

decisions and control as to future controversies. Both parties to a labor dispute are under the same constitution and both are subject to the valid acts of the legislature. Just where the line should be drawn in an effort to balance the bargaining power of the parties is primarily a matter of public policy for the legislature and not a question of law for the courts.

We discover no invasion of the right of freedom of speech either in sub. (2) (e), sec. 111.06, Stats. 1939, or in the way the law was administered by the board in this case. The right of the individual to freedom of speech is by the terms of the act left unimpaired. It is the right to concert of action that is regulated. Nor do we discover any such uncertainty or indefiniteness in the law as to render it invalid. While it is true that the terms "picketing" and "boycotting" are not terms of definite legal content, they are descriptive of a process well known to the law, and when considered in connection with the other provisions of chs. 111 and 103, Stats. 1939, the meaning of these terms becomes reasonably certain.

The statute is one providing for the regulation and protection of civil rights, and therefore does not partake of the nature of a criminal statute. By engaging in an unauthorized strike an employee loses his status as an employee. He then has the same rights and is subject to the same liabilities as a third person. When he thus withdraws from his employment he is free to speak, but his right to coerce his former employer is limited by the act. Except as his acts affect the employer he is under no restraint. It is true that the act limits the use of coercive measures as they have ordinarily been used in labor disputes, but that is a matter for the legislature. It is not within the province of the court to pass upon the wisdom or unwisdom of the public policy declared by the legislature.

Since we interpret the order of the board to be coextensive with the statute as construed, we find it unnecessary to modify the order or judgment.

By the Court.—Judgment affirmed.

The following opinion was filed January 7, 1941:

ROSENBERRY, C. J. (*on motion for rehearing*). On this motion appellants open their argument with the following statement:

"Since receipt of the supreme court's decision we have gone over it carefully and searchingly in order that we might have a clear and precise understanding of the basis for such decision.

"Only one thing was clear. That was that the Wisconsin supreme court, traditionally liberal and traditionally alert to protect the civil liberties of the citizens of this state, had placed its stamp of approval upon a statute, and an order based thereon, prohibiting minority groups from engaging in those rights guaranteed by the constitution of the United States. This for the sole reason that they were minority groups."

What counsel refer to is their claim that the act which provides that what is denominated in the opinion "an unauthorized strike," that is, one not made pursuant to a majority vote of employees, is an unfair labor practice, deprives the minority group of a constitutional right to strike and infringes the right of free speech. It is almost futile to attempt to reply to a contention of this kind in the face of the provisions of the statute and the explicit language of the opinion. Counsel continue to misinterpret the statute and, as a consequence, misunderstand the opinion.

Section 111.15 of the Employment Peace Act provides, among other things:

"Except as specifically provided in this chapter, nothing therein shall be construed so as to *interfere with or impede* or *or diminish in any way the right to strike* . . .; nor shall anything in this chapter be so construed as to *invade unlawfully the right to freedom of speech.*"

The last sentence contained in the opinion is

"Since we interpret the order of the board to be coextensive with the statute as construed, we find it unnecessary to modify the order or judgment."

It is explicitly stated in the opinion that the order of the board, the judgment of the circuit court affirming it, and the opinion of this court did not deal with anything approaching peaceful picketing. We pointed out—

"In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution."

How this can be tortured into a statement that minority groups are, by the order affirmed in this case, prohibited from peaceful picketing as described in the *Thornhill case*, is beyond our understanding. Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in.

We did not deal with every provision contained in the Employment Peace Act for the reason, as stated in the opinion, upon this appeal sec. 111.06 (2) (e), Stats. 1939, was the only section of the statute drawn in question and it is with the construction of that section that we deal and it is explicitly so stated in the opinion. We did not attempt, because it was not involved in this case, to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Par. (e), as construed, does not prohibit, as described in the *Thornhill case*, peaceful picketing. We may

say this, however, that the statute does not authorize the majority group, even though it has voted to strike, to commit acts of violence, to take possession of the employer's property and forcibly to prevent ingress and egress to and from the premises.

The appellant employees, unions, and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board.

This court does not seek applause on the ground that it is progressive and liberal, or indeed, upon any other ground. The court has, however, a duty, fairly and impartially to apply and interpret the law in all cases where the rights of citizens are involved to the end that their rights under the constitution and the law may be preserved to them inviolate. This duty it strives to discharge with fidelity to the law and the constitution. As we said in *American Furn. Co. I. B. of T. C. & H. of A., etc.* (1936), 222 Wis. 338, 365, 268 N. W. 250, 106 A. L. R. 335:

"We conclude that the act as we construe it . . . is a valid exercise of legislative power. . . . Whether such laws constitute a wise solution may, of course, be fairly put in question, but the forum for such a controversy is the legislature and not the courts. The question is irrelevant here, and we cannot resist the conclusion that one of the purposes of the labor code was to make it so and to substitute a legislative declaration of policy for the varying standards and views theretofore expressed in judicial opinions."

By the Court.—Motion denied with $25.00 costs.

APPENDIX "B."

WISCONSIN STATUTES

Chapter 111

EMPLOYMENT RELATIONS

(Enacted in 1939)

111.01 Declaration of policy. The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this chapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration.

It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and em-

ployé. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

111.02 Definitions. When used in this chapter:

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers.

(2) The term "employer" means a person who engages the services of an employe, and includes any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

(3) The term "employe" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employes of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employe or his representative, (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially

equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employe who is subject to the federal railway labor act.

(4) The term "representative" includes any person chosen by an employe to represent him.

(5) "Collective bargaining" is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

(6) The term "collective bargaining unit" shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do.

(7) The term "unfair labor practice" means any unfair labor practice as defined in section 111.06.

(8) The term "labor dispute" means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute.

(9) The term "all-union agreement" shall mean an agreement between an employer and the representative of his

employes in a collective bargaining unit whereby all of the employes in such unit are required to be members of a single labor organization.

(10) The term "board" means the Wisconsin employment relations board, as created by section 111.03.

(11) The term "election" shall mean a proceeding in which the employes in a collective bargaining unit cast a secret ballot for collective bargaining representatives or for any other purpose specified in this chapter and shall include elections conducted by the board, or, unless the context clearly indicates otherwise, by any tribunal having competent jurisdiction or whose jurisdiction was accepted by the parties.

(12) The term "secondary boycott" shall include combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists, whether by (a) withholding patronage, labor, or other beneficial business intercourse, (b) picketing, (c) refusing to handle, install, use or work on particular materials, equipment or supplies, or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another.

111.03 Employment relations board. There is hereby created a board to be known as Wisconsin employment relations board, which shall be composed of three members, who shall be appointed by the governor by and with the consent of the senate. No appointee at the time of the creation of the board shall serve on said board without first having been confirmed by the senate. The term of office of the members first to be appointed shall be two, four and six years respectively, but their successors shall be appointed for terms of six years each, except that any individual appointed to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The governor shall designate one member to serve as chairman of the board. Each member of the board shall take and file the official oath. A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the board and two members of the board shall constitute a quorum. The board shall have a seal for the authentication of its orders and proceedings, upon which shall be inscribed

the words "WISCONSIN EMPLOYMENT RELATIONS BOARD—Seal". Each member of the board shall be eligible for reappointment and shall not engage in any other business, vocation, or employment. The board may employ, promote and remove a secretary, deputies, clerks, stenographers and other assistants, and examiners, fix their compensation and assign them to their duties, consistent with the provisions of this chapter. The board shall maintain its office at Madison and shall be provided by the director of purchases with suitable rooms, necessary furniture, stationery, books, periodicals, maps and other necessary supplies. The board may hold sessions at any place within the state when the convenience of the board and the parties so requires. At the close of each fiscal year the board shall make a written report to the governor of such facts as it may deem essential to describe its activities, including the cases it has heard, its disposition of the same, and the names, duties and salaries of its officers and employes. A single member of the board is hereinafter in this chapter referred to as a commissioner.

111.04 Rights of employes. Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities.

111.05 Representatives and elections. (1) Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in section

111.02 (6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the board shall determine the representatives thereof by taking a secret ballot of employes and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employe or group of employes participating in the election, except that the board may, in its discretion, exclude from the ballot one who, at the time of the election, stands deprived of his rights under this chapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board.

(4) Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that if appears to the board that sufficient reason therefor exists.

111.06 What are unfair labor practices. (1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.04.

(b) To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it, provided that an employer shall not be prohibited from reimbursing employes at their prevailing wage rate for time spent conferring with him, nor from cooperating with representatives of at least a majority of his employes in a collective bargaining unit, at their request, by permitting employe organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company.

(c) To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where three-quarters or more of the employes in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. The board shall declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employe of such employer, and each such all-union agreement shall be made subject to this duty of the board. Any person interested may come before the board as provided in section 111.07 and ask the performance of this duty.

(d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit; provided, however, that where an employer files with the board a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the board.

(e) To bargain collectively with the representatives of less than a majority of his employes in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1) (c) of this section.

(f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

(h) To discharge or otherwise discriminate against an employe because he has filed charges or given information or testimony in good faith under the provisions of this chapter.

(i) To deduct labor organization dues or assessments from an employe's earnings, unless the employer has been presented with an individual order therefor, signed by the employe personally, and terminable at the end of any year of its life by the employe giving at least thirty day's written notice of such termination.

(j) To employ any person to spy upon employes or their representatives respecting their exercise of any right created or approved by this chapter.

(k) To make, circulate or cause to be circulated a blacklist as described in section 343.682.

(l) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

(e) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(d) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employes or their representatives accepted.

(e) To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(g) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining, use or disposition of materials, equipment or services; or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

(i) To fail to give the notice of intention to strike provided in section 111.11.

(j) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section.

111.07 Prevention of unfair labor practices. (1) Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this chapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.

(2) Upon the filing with the board by any party in interest of a complaint in writing, on a form provided by the board, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employe, or their representative, shall be made a party upon application. The board may bring in additional parties by service of a copy of the complaint. Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the board at any time prior to the issuance of a final order based thereon. The person or persons so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the notice of hearing. The board shall fix a time for the hearing on such complaint, which will be not less than ten nor more than forty days after the filing of such complaint, and notice shall be given to each party interested by service on him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. In case a party in interest is located without the state and has no known post office address within this state, a copy of the complaint and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last known post office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if

served upon the party located within this state. Such hearing may be adjourned from time to time in the discretion of the board and hearings may be held at such places as the board shall designate.

The board shall have the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by section 101.21. No perso shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the board on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture under the laws of the state of Wisconsin; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before the board in obedience to a subpoena issued by it; provided, that an individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall wilfully and unlawfully fail or neglect to appear or testify or to produce books, papers and records as required, shall, upon application to a circuit court, be ordered to appear before the board, there to testify or produce evidence if so ordered, and failure to obey such order of the court may be punished by the court as a contempt thereof.

Each witness who shall appear before the board by its order or subpoena shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of record, which shall be audited and paid by the state in the same manner as other expenses are audited and paid, upon the presentation of properly verified vouchers approved by the chairman of the board and charged to the proper appropriation for the board.

(3) A full and complete record shall be kept of all proceedings had before the board, and all testimony and proceedings shall be taken down by the reporter appointed by the board. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the

party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

(4) After the final hearing the board shall promptly make and file its findings of fact upon all of the issues involved in the controversy, and its order, which shall state its determination as to the rights of the parties. Pending the final determination by it of any controversy before it the board may, after hearing make interlocutory findings and orders which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employes with or without pay, as the board may deem proper. Any order may further require such person to make reports from time to time showing the extent to which it has complied with the order.

(5) The board may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the board as a body to review the findings or order. If no petition is filed within twenty days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the board as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the board shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within ten days after the filing of such petition with the board, the board shall either affirm, reverse, set aside or modify such

findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the board is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another twenty days for filing a petition with the board.

(6). The board shall have the power to remove or transfer the proceedings pending before a commissioner or examiner. It may also, on its own motion, set aside, modify or change any order, findings or award (whether made by an individual commissioner, an examiner, or by the board as a body) at any time within twenty days from the date thereof if it shall discover any mistake therein, or upon the grounds of newly discovered evidence.

(7) If any person fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the board. Upon such filing the board shall cause notice thereof to be served upon such person by mailing a copy to his last known post office address, and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein. Said action may thereupon be brought on for hearing before said court upon such record by the board serving ten days written notice upon the respondent; subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing the court may confirm, modify, or set aside the order of the board and enter an appropriate decree. No objection that has not been urged before the board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact made by the board, if supported by credible and competent evidence in the record, shall be con-

clusive. The court may, in its discretion, grant leave to adduce additional evidence where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the board. The board may modify its findings as to facts, or make new findings by reason of such additional evidence, and it shall file such modified or new findings with the same effect as its original findings and shall file its recommendations, if any, for the modification or setting aside of its original order.

The court's judgment and decree shall be final except that the same shall be subject to review by the supreme court in the same manner as provided in section 102.25.

(8) Within thirty days from the date of the order of the board as a body any party aggrieved thereby may petition the circuit court for the county in which he or any party resides or transacts business for review of the same; subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Where different parties in the same proceeding file petitions for review in two or more courts having proper jurisdiction, the jurisdiction of the court first petitioned shall be exclusive and the other petitions shall be transferred to it. Such petition shall state the grounds upon which a review is sought, and shall be served with the summons. Service upon the secretary of the board or any member of the board shall be deemed completed service on all parties; but there shall be left with the person so served as many copies of the summons and complaint as there are respondents, and the board shall mail one such copy to each respondent. If the circuit court is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of the findings or order, it may extend the time another thirty days in which such action may be commenced. The board shall thereupon file in the said court its record in the proceedings, as provided in the next preceding subsection. Such return of the board, when filed in the office of the clerk of the circuit court, shall constitute a judgment roll in such action, and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court

in such action. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' written notice to the other. Upon such hearing the court may confirm, modify or set aside the order of the board and enter an appropriate decree. Except as specifically provided otherwise herein the proceedings shall be the same as provided for in subsection (7) of this section.

(9). In any proceedings for review of an order of the board the court shall disregard any irregularity or error unless it be made to appear affirmatively that the complaining party was prejudiced thereby.

(10) Commencement of proceedings under subsections (7) or (8) of this section shall, unless otherwise specifically ordered by the court, operate as a stay of the board's order.

(11) Petitions filed under this section shall have preference over any civil cause of a different nature pending in the circuit court, shall be heard expeditiously, and the circuit courts shall always be deemed open for the trial thereof.

(12) A substantial compliance with the procedure of this chapter shall be sufficient to give effect to the orders of the board, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

(13) A transcribed copy of the evidence and proceedings or any part thereof on any hearing taken by the stenographer appointed by the board, being certified by such stenographer to be a true and correct transcript, carefully compared by him with his original notes, and to be a correct statement of such evidence and proceedings, shall be received in evidence with the same effect as if such reporter were present and testified to the fact so certified. A copy of such transcript shall be furnished on demand free of cost to any party (all of the members of a single organization being considered a single party).

(14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

111.08 Financial reports to employes. Every person acting as the representative of employes for collective bargaining shall keep an adequate record of its financial trasactions and shall present annually to each member within sixty days after the end of its fiscal year a detailed written financial report thereof in the form of a balance sheet and an operating statement. In the event of failure of compliance with this section, any member may petition the board for an order compelling such compliance. An order of the board on such petition shall be enforcible in the same manner as other orders of the board under this chapter.

111.09 Board shall make rules, regulations and orders. The board may adopt reasonable and proper rules and regulations relative to the exercise of its powers and authority and proper rules to govern its proceedings and to regulate the conduct of all elections and hearings. Such rules and regulations shall not be effective until ten days after their publication in the official state paper.

111.10 Arbitration. Parties to a labor dispute may agree in writing to have the board act or name arbitrators in all or any part of such dispute, and thereupon the board shall have the power so to act. The board shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided in chapter 298 of the statutes.

111.11 Mediation. The board shall have power to appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon its own initiative or upon the request of one of the parties to the dispute. It shall be the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the board shall have any power of compulsion in mediation proceedings. The board shall provide necessary expenses for such mediators as it may appoint, order reasonable compensation not exceeding ten dollars per day for each such mediator, and prescribe reasonable rules of procedure for such mediators.

Where the exercise of the right to strike by employes of

any employer engaged in the state of Wisconsin in the production, harvesting or initial processing (the latter after leaving the farm) of any farm or dairy product produced in this state would tend to cause the destruction or serious deterioration of such product, the employes shall give to the board at least ten days notice of their intention to strike and the board shall immediately notify the employer of the receipt of such notice. Upon receipt of such notice, the board shall take immediate steps to effect mediation, if possible. In the event of the failure of the efforts to mediate, the board shall endeavor to induce the parties to arbitrate the controversy.

111.12 Duties of the attorney-general and district attorneys. Upon the request of the board, the attorney-general or the district attorney of the county in which a proceeding is brought before the circuit court for the purpose of enforcing or reviewing an order of the board shall appear and act as counsel for the board in such proceeding and in any proceeding to review the action of the circuit court affirming, modifying or reversing such order.

111.13 Employer and employe committees. The board may, from time to time, appoint joint standing or special committees composed in equal numbers of representatives of employes and employers. The board may refer to any such committees for its study and advice any matters having to do with the relations of employers and employes or the operation of this chapter.

111.14 Penalty. Any person who shall wilfully assault, resist, prevent, impede or interfere with any member of the board or any of its agents or agencies in the performance of duties pursuant to this chapter shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not more than one year, or both.

111.15 Construction of this chapter. Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to in-

vade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes.

111.16 Existing contracts unaffected. Nothing in this chapter shall operate to abrogate, annul, or modify any valid agreement respecting employment relations existing on the effective date hereof.

111.17 Conflict of provisions; effect. Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this chapter this chapter shall prevail, provided that in any situation where the provisions of this chapter cannot be validly enforced the provisions of such other statutes or laws shall apply.

111.18 Separability of provisions. If any provision of this chapter or the application of such provision to any person or circumstances shall be held invalid the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

111.19 Title of chapter. This chapter may be cited as the "Employment Peace Act".

SECTION 2. (1) Section 20.58 of the statutes is hereby repealed and the unexpended balance of the appropriation made by said section is reappropriated to Wisconsin employment relations board for the administration of chapter 111 until July 1, 1939.

(2) Section 20.58 of the Wisconsin statutes is hereby recreated to read:

20.58 Wisconsin employment relations board; appropriation; salaries. There is hereby appropriated from the general fund to Wisconsin employment relations board annually beginning July 1, 1939, fifty thousand dollars for the administration of chapter 111. There is hereby allotted to each member of Wisconsin employment relations board out of any

sums appropriated for the administration of chapter 111 an annual salary of five thousand dollars.

SECTION 3. Section 298.01 of the statutes is amended to read: **298.01 Arbitration clauses in contracts enforcible.** A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable and enforcible save upon such grounds as exist at law or in equity for the revocation of any contract; provided, however, that the provisions of this chapter shall not apply to contracts between employers and employes, or between employers and associations of employes, *except as provided in section 111.10 of the statutes.*

Effective Date: May 5, 1939.